IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0552

STATE OF MONTANA,

Plaintiff and Appellee,

v.

TYSON LEE HAPPEL,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Thirteenth Judicial District Court,
Yellowstone County, The Honorable Gregory R. Todd, Presiding

APPEARANCES:

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STATEMENT OF THE ISSUE

Did the district court err in failing to inquire into Appellant's complaint that defense counsel had rendered ineffective assistance?

STATEMENT OF THE CASE AND FACTS

On January 5, 2009, the State charged the Appellant, Tyson Lee Happel (Happel), in Montana's Thirteenth Judicial District Court with assault with a weapon, felony theft, and two counts of tampering with evidence. (D.C. Doc. 3.) The charges arose out a bar fight and the alleged unrelated theft of a Ford truck. (D.C. Docs. 1, 3.) The State sought Happel's designation as a persistent felony offender (PFO). (D.C. Doc. 4.) The Office of the State Public Defender assigned Moira D'Alton (D'Alton) to represent Happel. (*See* D.C. Doc. 2.) Although competent, Happel has learning disabilities and difficulty expressing his thoughts. (6/22/09 Tr. at 4:16-21.)

On March 5, 2009, Happel appeared with counsel for a change of plea hearing. The district court accepted an Amended Information charging Happel with criminal endangerment and a single felony theft. (D.C. Doc. 14; 3/5/09 Tr. at 2.) Defense counsel filed an Acknowledgement of Waiver of Rights and Plea Agreement signed by the parties. (D.C. Doc. 15; 3/5/09 Tr. at 2.) Pursuant to this agreement, Happel pled guilty to both counts in exchange for the State's commitment to recommend concurrent sentences of ten years with three years

suspended. (D.C. Doc. 15 at 1-2; 3/5/09 Tr. at 3.) Happel reserved the ability to request the district court to sentence him to Montana's "Boot Camp" program. (D.C. Doc. 15 at 2.) The plea agreement was expressly designated as being made pursuant to Mont. Code Ann. § 46-12-211(1)(c) and included an affirmation by Happel that he understood that "if the plea is rejected by the Court that [he] will not be entitled to withdraw [his] plea of Guilty as a matter of law." (D.C. Doc. 15 at 2.) The agreement also noted that as a PFO the district court could sentence Happel to 100 years of incarceration. (D.C. Doc. 15 at 1.)

Prior to accepting Happel's guilty pleas, the district court engaged Happel in a colloquy. Among other topics, the district court asked Happel whether he was satisfied with his attorney's representation, whether he understood that he faced a possible 100 year sentence as a PFO, and whether he understood that the plea agreement was not binding on the district court, such that "if the Court were to sentence you more severely, that would not be grounds to withdraw [the] guilty pleas." (3/5/09 Tr. at 4-5, 7.) Happel answered all of these questions with single-word, "yes" responses. (3/5/09 Tr. at 4-5, 7.) Following the colloquy, the district court accepted Happel's guilty pleas as being knowingly and voluntarily made and set a sentencing hearing for May 11, 2009. (3/5/09 Tr. at 7.)

At the beginning of the May 11, 2009, hearing, defense counsel D'Alton alerted the district court that Happel had "filed a pro se motion to withdraw guilty

plea and for competent counsel." (5/11/09 Tr. at 2.) Happel's six-page written complaint was provided to the district court at the hearing. (5/11/09 Tr. at 4-5; D.C. Doc. 17.) The State opposed Happel's request and argued that within the process provided for by *State v. Finley*, 276 Mont. 126, 915 P.2d 208 (1996), "In Stage 1, the defendant has to allege some sort of seemingly substantial complaint that deals with why his counsel was ineffective and what was the prejudice associated with that ineffective representation." (5/11/09 Tr. at 2-3.) The State maintained that Happel's written request should be denied because it did not meet this burden.

When the district court asked for her response, D'Alton answered, "Well, Your Honor, I'm not really sure what to say. This is not a *Finley* hearing as far as I can tell, so I don't think I can respond to Mr. Happel's allegations." (5/11/09 Tr. at 3.) D'Alton indicated that the Office of the State Public Defender was not at this point going to assign new counsel. (5/11/09 Tr. at 3-4.) She concluded by suggesting to the district court, "I guess we should go to a *Finley* hearing so that Mr. Happel can tell the Court what he thinks his counsel did ineffectively." (5/11/09 Tr. at 4.) The district court did not invite comment from Happel himself nor afford him an opportunity to explain his allegations orally. Instead, the district court stated, "I will review the motion, and then I will determine if we need a hearing, and if we do, when. Because I think I have the authority to determine if it

meets the initial criteria for the motion." (5/11/09 Tr. at 5.) The State later filed a written brief opposing Happel request for new counsel and permission to withdraw his guilty pleas. (D.C. Doc. 18.)

Without issuing a written order or rationale, the district court informed the parties orally on May 22, 2009, that it was denying Happel's motions. The district court explained:

> So I am denying Mr. Happel's motions for at least a couple of reasons, and one is he is represented by counsel. But if -- as well as, I agree with the State's argument as well that there are no seemingly substantial complaints made in the pro se petition that would trigger the need for a hearing. I don't believe he's raised the threshold matters, so the motion is denied.

(5/22/09 Tr. at 2.) The district court never questioned Happel or D'Alton regarding Happel's allegations.

On June 22, 2009, the district court held a sentencing hearing. Pursuant to the plea agreement, the State recommended two, concurrent, ten-year sentences with three years suspended. (6/22/09 Tr. at 2.) D'Alton requested the district court to recommend Happel for the boot camp program. (6/22/09 Tr. at 3-4, 6.) The district court followed the plea agreement recommendation and imposed ten years in the Montana State Prison with three years suspended to run concurrently on both counts. (6/22/09 Tr. at 5; D.C. Doc. 22 at 1.) The district court also recommended that Happel be considered for the Treasure State Correctional Training Center boot camp program and retained jurisdiction under Mont. Code Ann. § 53-30-402 to

modify Happel's sentence should he successfully complete the program. (6/22/09 Tr. at 6; D.C. Doc. 22 at 2.) A written judgment memorializing this sentence was entered on August 10, 2009. (D.C. Doc. 22.)

On October 7, 2009, counsel from the Office of the Appellate Defender filed a timely notice of appeal on Happel's behalf.

SUMMARY OF THE ARGUMENT

Once a criminal defendant requests a district court to appoint new counsel and alleges ineffective representation by present counsel, the court must make an initial inquiry into the defendant's complaints sufficient to determine whether they are seemingly substantial. At a minimum, this inquiry requires providing the defendant an opportunity to address the district court to explain his concerns and then asking defense counsel about the problems identified by the defendant. Here, the district court neither gave Happel the opportunity to speak regarding his complaints nor asked defense counsel for a response or explanation. The district court's initial inquiry was, thus, inadequate and the matter must be remanded for the district court to make the required inquiry into Happel's complaints.

STANDARD OF REVIEW

This Court reviews a district court's denial of a request for appointment of new counsel for an abuse of discretion. *E.g.*, *State v. Gallagher*, 1998 MT 70, ¶ 10, 304 Mont. 215, 19 P.3d 817.

ARGUMENT

THE DISTRICT COURT ERRED IN FAILING TO INQUIRE INTO HAPPEL'S COMPLAINT THAT DEFENSE COUNSEL HAD RENDERED INEFFECTIVE ASSISTANCE.

This Court has on numerous occasions addressed the procedure that a district court must follow when responding to a defendant's request for appointment of new counsel based on present counsel's ineffectiveness. The Court has explained:

> A defendant is entitled to a hearing on the issue of ineffective assistance of counsel where the defendant presents a "seemingly substantial complaint" about effective assistance. If the defendant presents a "seemingly substantial complaint" the court should hold a hearing on the request for substitution of counsel. *State v. Kills On Top* (Mont. 1996), 279 Mont. 384, 928 P.2d 182, 190, 53 Mont. St. Rep. 1197, 1204; *State v. Weaver* (1996), 276 Mont. 505, 511, 917 P.2d 437, 441; *State v. Finley* (1996), 276 Mont. 126, 143, 915 P.2d 208, 218; *Morrison*, 848 P.2d at 516.
>
> We have held that the threshold issue in determining whether a "substantial complaint" exists is "not whether counsel was ineffective, but whether the District Court erred in failing to make an adequate inquiry into [a defendant's] claim of ineffective assistance of counsel." *Weaver*, 917 P.2d at 441. In determining if the defendant presented a seemingly substantial complaint about counsel, "it follows that the district court must make an adequate inquiry into the defendant's complaints." *Finley*, 915 P.2d at 219.
>
> In those cases where this Court has found a district court's inquiry into a defendant's complaints about counsel adequate, the district court considered the defendant's factual complaints together with counsel's specific explanations addressing the complaints. *State v.*

Craig (1995), 274 Mont. 140, 906 P.2d 683; *Morrison*, 257 Mont. 282, 848 P.2d 514.

City of Billings v. Smith, 281 Mont. 133, 136-37, 932 P.2d 1058, 1060 (1997). The Court has recently reiterated that the initial inquiry "is sufficient if the district court considers the defendant's factual complaints together with counsel's specific explanations addressing the complaints." *State v. Rose*, 2009 MT 4, ¶ 96, 348 Mont. 291, 202 P.3d 749. A district court's failure to make an adequate initial inquiry into ineffectiveness complaints from a defendant is an abuse of discretion. *Halley v. State*, 2008 MT 193, ¶¶ 17-18, 344 Mont. 37, 186 P.3d 859.

Although the State acknowledged below that a "District Court's inquiry is sufficient when it considers the defendant's factual complaints together with counsel's specific explanations addressing the complaints," the State nevertheless maintained that "Defense counsel's failure to inform the District Court of her side of the story as alluded to in binding case law is irrelevant" because Happel's previously filed Acknowledgement of Waiver of Rights and Plea Agreement "nullifies the Defendant's complaint about his counsel." (D.C. Doc. 18 at 3-4.) The State further asserted that this "Acknowledgment (along with acceptance of the guilty plea by the District Court) is conclusive proof of the failure of the Defendant to raise a seemingly substantial complaint in this matter." (D.C. Doc. 18 at 4.) In sum, the State maintained that the district court could rule based on the existing record without making any actual inquiry of D'Alton or Happel.

The State provided no legal citation for this contention, and it is contrary to what the State acknowledges as the "binding case law" in this area. As summarized above, this Court has clearly established that once a defendant asserts his attorney is being ineffective, the district court "'*must* determine if the complaints are substantial by making an adequate initial inquiry into the nature of the complaints.'" *Halley*, ¶ 17 (*quoting State v. Hendershot*, 2007 MT 49, ¶ 23, 336 Mont. 164, 153 P.3d 619). The Court has found error where the district court did not allow the defendant an opportunity in court "to express his specific complaints" and "to substantiate his allegations." *See Smith*, 281 Mont. at 140, 932 P.2d at 1062-63. An ineffectiveness complaint and request for new counsel creates an affirmative obligation for the district court to inquire into whether the complaint is seemingly substantial. It may be a very short inquiry, but a district court may not summarily deny the request.

Here, upon receipt of Happel's written complaint regarding defense counsel D'Alton, the district court failed to make any actual inquiry. The district court never asked Happel to justify or elaborate upon his allegations. Happel was never given an opportunity to respond to the State's brief nor to explain how his monosyllabic affirmations during the change of plea colloquy and signature on the Acknowledgment prepared with D'Alton were the results of D'Alton's deficient performance, not evidence of the opposite. Indeed, even though defense counsel

explicitly suggested that "we should go to a *Finley* hearing so that Mr. Happel can tell the Court what he thinks his counsel did ineffectively," no in-court statements of any kind were solicited from Happel at any time between the district court's receipt of Happel's written complaint and when the district court orally denied it. (*See* 5/11/09 Tr. at 2-6; 5/22/09 Tr. at 2.)

The district court did give D'Alton an opportunity to speak, but she merely stated, "This is not a *Finley* hearing as far as I can tell, so I don't think I can respond to Mr. Happel's allegations." (5/11/09 Tr. at 3.) The district court did not insist upon a response from D'Alton or in any other way inquire further of D'Alton regarding Happel's complaints. (*See* 5/11/09 Tr. at 3-5.) The district court never even asked D'Alton the simple question of whether she had or had not advised Happel of the topics in question.

Stating that it agreed with the State's argument "that there are no seemingly substantial complaints made in the pro se petition that would trigger the need for a hearing," the district court summarily denied Happel's request for new counsel based merely upon Happel's initial written complaint and the State's response. (*See* 5/22/09 Tr. at 2.) The complete absence of any substantive inquiry of Happel or D'Alton regarding D'Alton's allegedly deficient performance was an abuse of discretion. *See Halley*, ¶¶ 21, 24; *Smith*, 281 Mont. at 140-41, 932 P.2d at 1062-63; *Weaver*, 276 Mont. at 511-12, 917 P.2d at 441-42.

Remand for the district court to make the initial inquiry that it previously failed to conduct is an appropriate remedy for such an error. *Smith*, 281 Mont. at 141, 932 P.2d at 1063; *Weaver*, 276 Mont. at 512, 917 P.2d at 441-42. If after inquiry, the district court finds Happel's complaints to be seemingly substantial, the district court can then conduct a full hearing on the complaints' validity and, if the court ultimately finds Happel was denied effective assistance of counsel, appoint new counsel to assist Happel in filing motion to withdraw guilty plea. *See Smith*, 281 Mont. at 141, 932 P.2d at 1063.

CONCLUSION

Happel requests this Court to remand this matter for the district court to conduct an adequate initial inquiry into Happel's request for appointment of alternate counsel and to further order that in the event that the district court determines Happel's attorney provided ineffective assistance, the district court shall appoint new counsel to assist Happel in filing a motion to withdraw his guilty pleas.

Respectfully submitted this 29th day of March, 2010.

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

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KOAN MERCER

APPENDIX